

* Janna - OGC : OPM - KCMARZ - PCK
* Anna - OPM : list of AD's
* ~~Angela Bennett. email - May 02.~~

Purpose

The Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA) conducted an audit of the EPA's use of administratively determined (AD) positions. Our objective was to determine how the agency used its authority under the Safe Drinking Water Act (SDWA) to fill up to 30 AD positions. This audit was initiated based, in part, on a congressional request.

Background

The EPA Administrator has authority under the SDWA to appoint personnel to fill not more than 30 scientific, engineering, professional, legal and administrative positions without regard to the civil service laws. The agency refers to these positions as *AD positions*.

A provision of the SDWA—42 U.S.C. § 300j-10, which is titled “Appointment of scientific, etc., personnel by Administrator of Environmental Protection Agency for implementation of responsibilities; compensation”—provides the following description of the Administrator's authorities related to AD positions:

To the extent that the Administrator of the Environmental Protection Agency deems such action necessary to the discharge of his functions under title XIV of the Public Health Service Act [42 U.S.C. 300f et seq.] (relating to safe drinking water) and under other provisions of law, he may appoint personnel to fill not more than thirty scientific, engineering, professional, legal, and administrative positions within the Environmental Protection Agency without regard to the civil service laws and may fix the compensation of such personnel not in excess of the maximum rate payable for GS-18¹ of the General Schedule under section 5332 of title 5.

While the SDWA is specific as to the number and classification of AD appointments, it does not provide specific details regarding how the appointments are to be used. We found no requirement that appointees work on issues related to the SDWA. In addition, the congressional record does not clearly identify whether the AD positions are intended to be drinking-water related.

Appointment Authorities

The EPA has various appointment authorities besides those granted under the SDWA, including the following:

¹ GS stands for *General Schedule*.

- *Noncareer Senior Executive Service (SES)*. The number of these appointments are limited by law and are excepted from competitive service.
- *Schedule C*. These positions are excepted from competitive service because they have policy-determining (i.e., policymaking) responsibilities or require the appointees to serve in close and confidential working relationships with the head of an agency or other key appointed officials.
- *Schedule A*. These appointments include positions excepted from competitive service that are not of a confidential or policy-determining character. This appointing authority is used for special jobs or situations for which it is impractical to use standard qualification requirements and to rate applicants using traditional competitive procedures.
- *Career Conditional*. These are permanent positions in the competitive service for employees with less than 3 years of federal service.

Sch. C can be appointed Non-career SES and vice versa.

Depending on the requirements of the position, the agency can convert employees appointed to AD positions to these other types of positions. Schedule C and noncareer SES employees are considered *political appointees* because they are excepted from the competitive service due to their confidential or policymaking nature within an executive agency. All Schedule C and noncareer SES appointments, including those converted from AD positions, must undergo a U.S. Office of Personnel Management (OPM) approval process. In addition, all employees hired under Schedule C and noncareer SES authorities on or after January 20, 2017, must sign the ethics pledge required for executive agency

appointees by Executive Order 13770, *Ethics Commitments by Executive Branch Appointees*, issued January 28, 2017. ** All Sch C & non career SES must sign Obama Admin*

Conversions—along with resignations, retirements and terminations—enable the EPA to maintain the SDWA requirement of having up to 30 AD positions.

pledge, Clinton Admin pledge.

EPA Administrations

The scope of our audit spanned six EPA administrations:

Administrator	Tenure
Andrew Wheeler	7/7/18–present* (acting until 2/28/19)
Scott Pruitt	2/17/17–7/6/18
Catherine McCabe (acting)	1/20/17–2/17/17
Gina McCarthy	7/19/13–1/20/17
Bob Perciasepe (acting)	2/15/13–7/18/13
Lisa P. Jackson	1/26/09–2/14/13

* As of publication of report.

AD Appointments

As shown in Table 1, the EPA appointed 119 individuals to AD positions from January 2009 through August 2018. The appointments made to each office and region varied by administration. Of these 119 appointments, 57 (48 percent) were made to positions in the Administrator's office, 29 (24 percent) were made to positions in

various regional offices, and 24 (20 percent) were made to the program offices. Of the six agency administrations in the scope of our audit, the Pruitt administration appointed the most employees to AD positions (55), followed by the Jackson administration (36).

Table 1: Number of AD appointees from January 2009 through August 2018

Office	Administrator ^a					Total
	Jackson	Perciasepe	McCarthy	Pruitt	Wheeler	
Administrator	8	1	11	36	1	57
Program offices						
Air and Radiation		1	2	3		6
Chief Financial Officer	1					1
Chemical Safety and Pollution Prevention	1			1		2
Enforcement and Compliance Assurance	1					1
International and Tribal Affairs	1		1			2
Solid Waste and Emergency Response	1					1
Water	1		1	3		5
Research and Development			1	1		2
Environmental Information			1			1
General Counsel			2	1		3
<i>Program office subtotal</i>	6	1	8	9	0	24
Regional offices						
Region 1	2			1		3
Region 2	2			1		3
Region 3	2			1		3
Region 4	1		1	2		4
Region 5	2			1		3
Region 6	1	1		1		3
Region 7	1			1		2
Region 8	2		1	1		4
Region 9	1				1	2
Region 10	1		1			2
<i>Regional office subtotal</i>	15	1	3	9	1	29
Other						
Unknown ^b	7		1	1		9
Total AD appointees	36	3	23	55	2	119

Source: OIG-generated based on personnel records from OPM's electronic Office Personnel Folder (eOPF).

^a Administrations are listed in chronological order. No AD appointments were made during the McCabe administration.

^b Office was not identified in personnel records.

As shown in Table 2, the 119 AD appointments from January 2009 through August 2018 were spread across four classifications: professional, legal, scientific and administrative. Based on information obtained from personnel records, we classified 100 (84 percent) of the total appointments as professional positions. The remaining 19 appointments were classified as either legal, scientific or administrative positions.²

² The OIG's position classification includes some auditor judgement, especially for the "administrative" category. The auditor based the "administrative" designation on education, experience and pay. For example, if the individual lacked experience, was a recent college graduate or had no college degree and was appointed at a GS-7 or GS-9 pay level, the individual was classified as "administrative."

Table 2: AD position classifications from January 2009 through August 2018

Administrator ^a	Professional	Legal	Scientific	Administrative	Total
Jackson	30	1		5	36
Perciaspe	3				3
McCarthy	18	2		3	23
Pruitt	47	2	1	5	55
Wheeler	2				2
Total	100	5	1	13	119
Percent of total	84%	4%	1%	11%	100%

Source: OIG-generated based on data from personnel records from OPM's eOPF.

^a Administrations are listed in chronological order. No AD appointments were made during the McCabe administration.

The Pruitt administration made more professional AD appointments within the Administrator's office than the other administrations in our audit scope, including Deputy Associate Administrators, Directors, Deputy Directors, Senior Advisors and Special Assistants. In addition, the Pruitt administration made three AD appointments to the Office of Water: one scientific position (Science Advisor to the Assistant Administrator) and two professional positions (Deputy and Associate Deputy Assistant Administrator). AD appointments made in the regions by the Pruitt administration included positions such as the Chief of Staff to the Regional Administrator, Senior Advisor, Regional Administrator and Deputy Regional Administrator.

Responsible Offices

The Chief of Staff and the White House Liaison, both within the Office of the Administrator, are responsible for recruiting and recommending individuals for AD positions, with input from the Administrator.

* Rec. to OMS?

The Office of Human Resources' Policy, Planning and Training Division, provides agencywide leadership, support and policy guidance regarding human resource services for the agency's SES and political appointments, including Schedule C, noncareer SES and AD positions.

Prior Report

EPA OIG Report No. [18-N-0154](#), *Management Alert: Salary Increases for Certain Administratively Determined Positions*, issued April 16, 2018, provided information pertaining to six employees who occupied AD positions. Specifically, the report outlined certain personnel actions, including who requested and signed actions related to these employees, position conversions, and salary increases. The OIG found that the Pruitt administration used the authority under the SDWA to provide significant pay raises for individuals in AD positions. We identified three employees appointed to AD positions who were converted to Schedule C positions and then back to their original AD positions. Two of the employees received salary increases with the Schedule C conversion. All three employees received significant salary increases, ranging from 25.1 percent to 72.3 percent, *

misleading

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Project No. OA-FY18-0075

4

when appointed back to their original AD positions. The agency reduced the salaries of the two employees who received increases with their Schedule C conversions back to their original AD salaries. The OIG made no recommendations.

Scope and Methodology

We conducted our audit from November 2018 to April 2019 in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for the findings and conclusions presented in this report.

To determine how the agency used its authority to fill the AD positions, we interviewed staff from the Office of Mission Support's Office of Human Resources, obtained a list of AD positions, and reviewed personnel files. We also compared how different administrations from January 2009 through August 2018 used AD positions.

To gain an understanding of ethics requirements related to AD positions, we interviewed management officials in the EPA Ethics Office, reviewed EPA ethics guidance, and considered various memorandums and orders issued by the U.S. Office of Government Ethics.

Administratively Determined Positions Not Considered Political Appointments; Ethics Pledge Not Required

Executive Order 13770, *Ethics Commitments by Executive Branch Appointees*, requires "[e]very appointee in every executive agency appointed on or after January 20, 2017," to sign the ethics pledge outlined in the order. Although AD employees are appointed to their positions, the EPA has determined that they are not political appointees and are therefore not required to sign the ethics pledge required under Executive Order 13770. According to the EPA, the requirement to take the ethics pledge also does not apply to those individuals appointed to AD positions who may be converted to political appointments in the future (e.g., to Schedule C and noncareer SES positions) or who are serving in positions that are similar to political positions (e.g., have a confidential or policymaking character). Any AD appointee converted to a political position, however, is subject to the scope of the pledge upon conversion.

Contradict
each other

first
sentence not
true.

From the time Executive Order 13770 was enacted in January 2017 through August 2018, the EPA converted 24 AD positions to political appointments. Our analysis showed that the Pruitt and Wheeler administrations—the two EPA administrations that were subject to the order—used the AD positions to facilitate

the hiring of political appointees. This finding was evidenced by the number of AD positions converted by these two administrations to noncareer SES or Schedule C positions within months of their original appointment (23 conversions for Pruitt and 1 for Wheeler out of 57 appointments). The EPA has determined that AD positions are not subject to the ethics pledge requirement. Consequently, AD appointees are not required to refrain from the type of conduct prohibited by the ethics pledge.

** not true,
at must
very misleading*

Executive Order and Appointment Authorities

Executive Order 13770 requires “every appointee in every executive agency appointed on or after January 20, 2017,” to sign the ethics pledge. The order provides the following definition of an appointee:

[E]very full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency.

The pledge states that its obligations are binding and enforceable under the law. The obligations are in addition to any statutory or other legal restrictions applicable to government service. Most pledge obligations pertain to “revolving door” and lobbying activities.³ The following list provides examples of the pledge obligations:

- Not engaging in lobbying activities with respect to the agency within 5 years after termination of employment.
- Not accepting gifts from registered lobbyists or lobbying organizations for the duration of the appointment. *
- Not participating in any matter involving specific parties that is directly and substantially related to a former employer or clients, including regulations and contracts, for a period of 2 years from the date of appointment. *
- Not basing hiring and other employment decisions on factors other than the candidates’ qualifications, competence and experience. *

The Office of Government Ethics issued Legal Advisory LA-17-02 addressing Executive Order 13770 on February 6, 2017. The legal advisory defines an appointee as every full-time, noncareer Presidential or Vice-Presidential

³ “Revolving door” activities refer to actions—such as lobbying or advocacy activities that are directed toward and influence current federal officials—taken by individuals who enter private employment after leaving federal service.

appointee, noncareer appointee in the SES or other SES-type system, and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character. The legal advisory does not specifically address AD positions under the SDWA. However, the Office of Government Ethics told the EPA's Office of General Counsel that AD positions are not political because the appointees are not required to resign with an agency administration change and are not Schedule C appointments.

* When?

Federal regulations (specifically, 5 CFR § 213.3301) prescribe the authority for agencies to make appointments to positions of a confidential or policy-determining nature. Upon specific authorization by the OPM, agencies may make appointments under this provision to positions that are of a policy-determining nature or that involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service, are considered political appointments and are known as Schedule C appointments.

Relevance of 177?
Random.

Individuals in AD Positions Not Required to Sign Ethics Pledge

The EPA Office of General Counsel stated in an email to the OIG that employees in AD positions are appointed directly to the EPA through a process that is overseen by the Administrator's Chief of Staff. AD positions are filled noncompetitively but are not vetted and approved by the OPM. Neither the EPA nor the Office of Government Ethics considers AD appointments to be political appointments; therefore, employees appointed to AD positions are not required to sign the Executive Order 13770 ethics pledge, unless and until they are converted to a political appointment.

per SDWA

and always has been.

In addition, the agency's Chief of Staff stated in an interview with the OIG that AD positions are not political appointments. From his perspective, however, there is very little that differentiates AD positions from political positions. Nevertheless, according to the Chief of Staff, the EPA does not require AD appointees to sign the ethics pledge. The Chief of Staff said that the EPA does require AD appointees—like all EPA employees—to comply with agency ethics requirements.

→ fully expected and required to receive ethics training and adhere to ethics requirements

While AD appointees who are converted to political appointees are required to take the ethics pledge upon conversion, they are not subject to the obligations of the ethics pledge during their tenure as AD appointees. Likewise, AD appointees who work in positions that are similar to political positions (e.g., have a confidential or policymaking nature) but who are never converted to political appointees are not legally required to follow the obligations of the ethics pledge.

→ Not an accurate characterization.

misleading

Authority Used to Facilitate Hiring of Political Appointees

As shown in Table 3 and Figure 1 below, of the 119 appointments to AD positions from January 2009 through August 2018, 35 were converted to different types of appointments. Not only did the Pruitt administration *appoint* more individuals under the AD authority than previous administrations (see Table 1 in “Background” section), it also *converted* more. Specifically, the Pruitt administration converted 23 of the 55 individuals it hired under the AD authority to either noncareer SES or Schedule C positions. In contrast, the total combined number converted by the other administrations was 12. **When those 23 were converted they signed ethics pledge.*

Table 3: AD position activity from January 2009 through August 2018

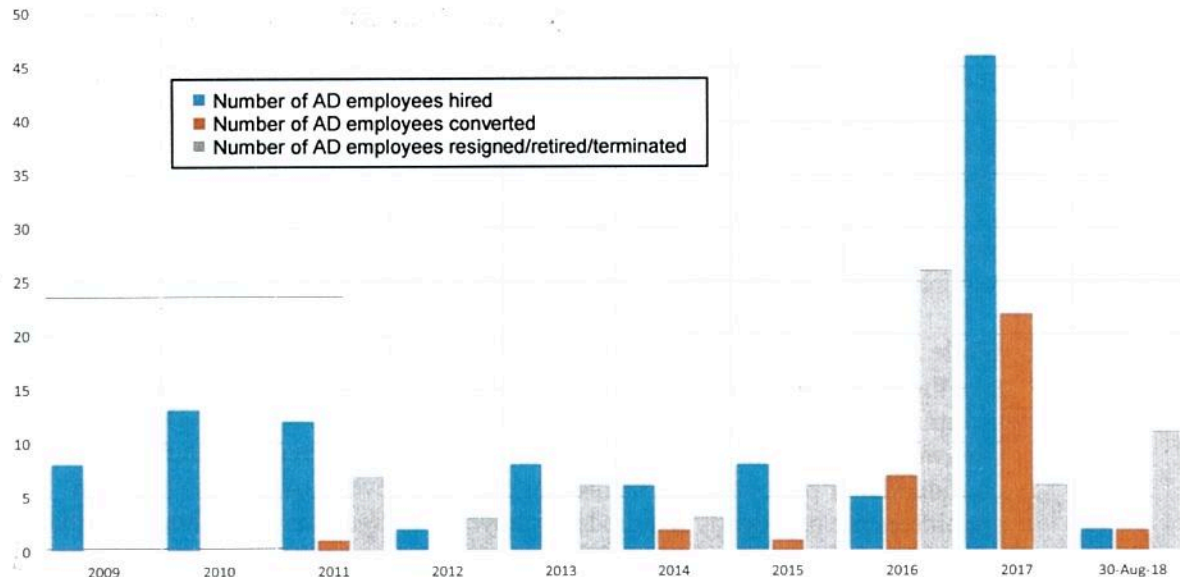
Administrator ^a	Total number of AD appointments	Conversions				Total Conversions	Resigned, retired or terminated
		Noncareer SES	Schedule C	Schedule A	Career conditional		
Jackson	36				1	1	11
Perciaspe	3					0	5
McCarthy	23	2	5	2	1	10	35 ^b
Pruitt	55	6	17			23	10
Wheeler	2		1			1	7
Total	119	8	23	2	2	35	68

Source: OIG-generated based on provided by EPA's Office of Human Resources' Executive Resources Division.

^a Administrations are listed in chronological order. No AD activity occurred during the McCabe administration.

^b McCarthy's Chief of Staff believed that all appointees should leave at the end of the administration, and most—including those remaining from the Jackson administration—did leave. *→ not all?*

Figure 1: Analysis of AD position activity from January 2009 through August 2018



Source: OIG-generated figure based on Table 3 data.

off
it took only
33 days
before signing
pledge instead
of 770-363
days.

Unlike the other administrations, the Pruitt and Wheeler administrations often converted—within months—individuals originally hired through the SDWA appointing authority to Schedule C or noncareer SES appointments. Of the Pruitt administration's 23 conversions, the average number of days from appointment to conversion was 58 days. The one conversion that occurred as of August 2018 under the Wheeler administration took only 33 days. In contrast, the 10 conversions under the McCarthy administration averaged 770 days, and the one conversion under the Jackson administration took 363 days. The much lower conversion times under the Pruitt and Wheeler administrations support that those AD appointments were made to convert them to political positions.

In addition, we found that many of the individuals converted from AD positions to political positions by the Pruitt and Wheeler administrations retained the same position title. The duties and responsibilities also appeared to remain the same or substantially the same, although it was unclear whether the duties and responsibilities included more of a confidential or policymaking role after the conversions. Regardless, the Pruitt and Wheeler administrations used the SDWA authority to quickly appoint individuals for future political appointments. This practice allowed the administrations to make appointments to AD positions that potentially have a political character and, temporarily avoid the ethics pledge.

is not
true and
would like
to see
evidence.

Conclusion

misleading...

EPA followed the
SDWA, OGE, OGC
Ethics,

The EPA used its authority under the SDWA to expedite the hiring of political appointees. The agency made AD appointments with the intention of converting them—often within months—to political appointments (noncareer SES or Schedule C positions). By doing so, the EPA enabled employees who were intended for political positions or who were serving in similarly situated positions to come on board without having to sign the ethics pledge required by Executive Order 13770. As a result, AD appointees are not required to refrain from the type of conduct prohibited by the ethics pledge.

Recommendation

We recommend that the (Assistant Administrator for Mission Support)

cos?

1. Require all existing and future employees in AD positions that are similar to political positions (e.g., have a confidential or policymaking nature) or who are intended to be converted to political appointees take the ethics pledge required by Executive Order 13770, *Ethics Commitments by Executive Branch Appointees*, issued January 28, 2017.

**OIG Audit of Administratively Determined Positions--Discussion Document
(Project No OA-FY18-0085)**

Draft, deliberative notes for meeting

The following are comments solely from the agency chief of staff concerning this audit. I am providing these comments pursuant to the invitation to provide oral or written comments in anticipation of a meeting between OIG and agency staff the week of May 20. This is not the agency's official written response which will be provided following our meeting. This also does not include all the contributions from agency offices which will attend the meeting between OIG and agency staff this upcoming week. This is simply to provide what I intend to raise at the meeting because I believe that is transparent and allows you to prepare. I would have provided some of these comments as a redline to your draft as we have provided to previous audits. However, your draft was in a PDF. An email from the OIG staff referenced draft comments will also be released. It is unclear what that means because the OIG has not released redlines we have provided to previous audits. This is a redline. The agency expects any final publicly released audit to include the agency's formal response as the OIG has done previously. I do not expect drafts to appear in any final audit.

This audit concludes that the agency used its authority under the Safe Drinking Water Act to expedite the hiring of political appointees. It creates the impression that AD employees do not have to adhere to ethical requirements. At least six separate times in nine pages of this audit, it refers to AD employees and the ethics pledge. Only twice does the audit state that AD employees must adhere to ethical obligations of any kind.

Although the OIG staff interviewed agency OGC ethics staff, the audit does not include those interviews nor explain how the agency ethics staff have provided ethics advice to AD employees in this Administration and previous Administrations. Although OIG staff interviewed agency ethics staff, the audit does not include the discussion of how ethics staff have drafted recusal statements for many AD employees which have required recusal statements due to their professional history and experience. Although the OIG staff interviewed agency ethics staff, the audit does not describe the ethics review specific to this Administration of all AD employees before they begin work at the agency nor does it describe the ethics training AD employees receive. The audit does not describe the ethical restrictions and rules for AD employees in this Administration and previous Administrations dating to 1977. It barely addresses long standing Office of Government Ethics advice for AD employees. Although the OIG staff interviewed agency ethics staff, the audit does not include their discussion of hiring authorities similar to AD hiring authority at other federal agencies and the obligations of those employees.

The audit chooses to cover the Obama Administration and Trump Administration. It does not reference the Obama Administration pledge at any point. Nor does the audit reference the Office of Government Ethics advice concerning Obama Administration AD employees.

The audit's conclusion should be that EPA followed the Safe Drinking Water Act, long-standing written agency policy addressing the hiring and obligations of AD employees, Office of Government Ethics advice, and career agency ethics officer advice concerning AD employees. At no point does this audit demonstrate otherwise.

I provided the OIG staff not only the Safe Drinking Water Act statutory section but the legislative history for that section, and I provided the agency's long-standing written policy (predating this Administration, dating at least to 2010) concerning the hiring and obligations of AD employees. That written policy is not

even referenced in the audit. AD employees have been hired in this Administration entirely consistent with written agency policy, the statute, and legislative history supporting the statute.

The draft recommendation of the audit is misdirected to OMS, but more importantly, the recommendation advocates for the agency to treat Trump Administration employees differently than Obama Administration employees and Clinton Administration employees. Both Obama and Clinton Administrations also had pledges. AD hiring authority was established in 1977. It is important that any recommendation does not advocate for treating Trump Administration employees differently than employees of previous Administrations over the past 40 years.

Finally, I would like to highlight misleading text or inaccurate text:

Pg. 2 first full paragraph – Schedule C employees may be converted to other types of positions such as to non-career SES employees. Vice versa is true as well. They also may be converted to AD employees.

Pg. 2 same paragraph – The OIG states its audit covers the Obama and Trump Administrations, but it makes no mention of the Obama Administration pledge. The paragraph and the audit solely mention E.O. 13770. Additionally, the audit does not mention the Clinton Administration pledge. The AD hiring authority under the Clean Water Act has existed since 1977 covering Administrations other than the present Administration.

Pg. 4 last line of paragraph – This references 25.1% and 72.3% raises, yet does not address whether responsibilities for the personnel involved changed. This sentence is also highly misleading because it does not address whether there were interim raises in salary as the personnel became responsible for new and additional responsibilities. In fact, the OIG is well aware of the progression of the salary history yet does not discuss that in this audit.

Pg. 5 second to the last paragraph – The last two sentences of that paragraph contradict each other. The second to the last sentence of the paragraph is not true or at least misleading.

Pg. 6 last line of first paragraph – Highly misleading that AD employees are not required to adhere to ethical requirements. This may be the worst example in the audit. Page 6 provides examples which are misleading, to be gracious, such as insinuating AD employees may take gifts from lobbyists, work on matters for former employers, or that they are not hired for their qualifications, competence, or experience.

Pg. 7 last sentence of the first paragraph – OGE's opinion has been consistent not simply since 2017, but OGE's opinion has been consistent since at least 2009. That is not addressed in this audit although it claims to cover the Obama Administration and Trump Administration. This paragraph also references whether AD employees are required to resign at the end of the Administration. On page 8 of this audit, it references an interview with Administrator McCarthy's chief of staff stating that not all AD employees left at the end of the Administration. This appears inconsistent.

Pg. 7 first full paragraph – What is the relevance of this paragraph to this audit?

Pg. 7 third full paragraph references an email from the EPA OGC yet the audit fails to mention that this has been the same practice in the Obama Administration and in all previous Administrations.

Pg. 7 third full paragraph, second sentence fails to address an important statutory authority. It should read, "AD positions are filled noncompetitively but are not vetted or approved by the OPM which is consistent with the Safe Drinking Water Act."

Pg. 7 third full paragraph, last sentence fails to address that AD positions must adhere to ethical requirements. This contributes to an impression in this audit that they do not.

Pg. 7 fourth full paragraph – the characterization that very little differentiates AD positions from political positions is a mischaracterization. I am not sure what the context of the conversation was and would like to review it.

Pg. 7 last paragraph – This continues the impression that AD employees are not subject to ethical requirements. It is entirely misleading.

Pg. 8 first paragraph – When EPA in this administration has converted an AD employee, they sign the ethics pledge. This is true for the numbers converted in this Administration, and I am assuming the employees converted in the Obama Administration.

Pg. 9 first paragraph – The conclusion of the paragraph is that conversion period for employees demonstrate they are hired for political positions. However, all the paragraph demonstrates is that AD employees in this Administration whether converted to another status on an average of 58 days or 33 days signed pledges sooner than AD conversions in the previous Obama Administration with conversion averages of 770 days and 363 days.

Pg. 9 second paragraph – The claim that when converted to another status AD employees retain the same position title is not true. An AD employee converted to another status often changes responsibilities and title and the conversion is the reason for the change. I would like to see the evidence leading to the conclusions in this paragraph. Additionally, the paragraph contributes to the impression that AD employees do not have ethical obligations. That is simply untrue.

Pg. 9 recommendation – Your recommendation is directed at the AA for OMS when your audit on pages 4 and 7 lists the chief of staff as being responsible for hiring AD employees.